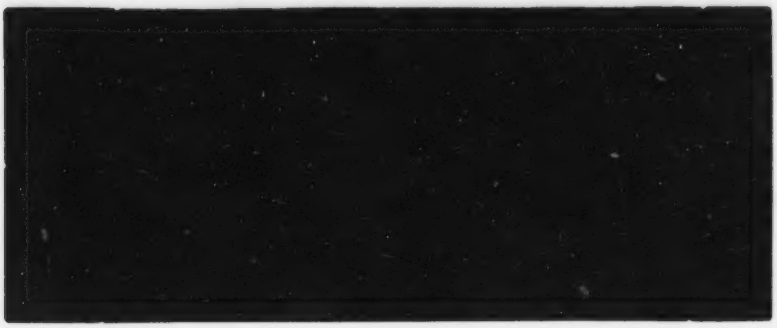
Canadian Centre
For Foreign Policy
Development

Centre Canadien
pour le développement
de la politique étrangère

Policy Options



125 Sussex Drive, Ottawa, Ontario K1A 0G2
Phone: 613 944 4150 (Communications) 613 944 0391 (Project/Fund Information) 613 992 3690 (Events Information)
Fax: 613 944 0687 **Web-site: http://www.cfp-pec.gc.ca**

101-00624/

CANADA, THE EU AND MULTILATERALISM: A DISCUSSION 'PAPER'

- by Peggy Mason

[1] Note that this draft is the NEW material requested which needs to be MERGED with a corrected version of the ORIGINAL DRAFT (which is forthcoming). In addition to this new material, there is also a section forthcoming on how to reorganize the problems identified in the Original Draft.

SECTION A: OVERVIEW OF THE EUROPEAN UNION

Introduction

The European Union, an association of 15 independent states comprising 370 million inhabitants and representing the world's largest single trading entity, is most distinguished by the **supranational** character of its Institutions. With some but not all of the powers associated with statehood, the European Union is a unique international organization which poses some daunting challenges to multilateral diplomacy both for its Member States and non-Members alike.

Part One: (1) Evolution of the EU

The European Union was established by the Maastricht Treaty[1] which came into force in November, 1993. It created an explicit **three-pillar** structure, establishing the European Community[2] as Pillar 1 (Supranational Institutions) and creating two new pillars, intergovernmental cooperation in foreign and security policy **(CFSP)**[3] and intergovernmental cooperation in home and justice affairs **(JHA)**. It also expanded the scope of the European Economic Community - renamed the **European Community (EC)** - to include provisions for an **Economic and Monetary Union,** with a single European currency from the end of the century onwards.

As a result, the term **European Community**, or **Community**, refers to matters governed by the Treaty of Rome (as amended[4]) relating to the single, internal - or common - market. The **European Union (EU)** is the ***broader*** term introduced by the Maastricht Treaty and is used when referring to the areas covered by the original **Community Treaties**[5] *and* also to second and third pillar areas.

The European Communities' founding Treaties created institutions that were given many of the legislative, executive and judicial powers traditionally exercised by Member States at the national level. Since the introduction of the **Single Institutional Framework** pursuant to the Maastricht Treaty, the European Union now encompasses these ***supranational*** institutions.

---

[1] Its formal title is the Treaty on European Union (TEU).

[2] Despite the merging of the institutions which serve them, as described in footnote 4 below, in legal terms, there continue to be three ***separate*** communities. However, **common usage** treats the three communities as one.

[3] The 1985 Single European Act set out the legal framework for European Political ***Cooperation*** (EPC), begun in 1970. The Maastricht Treaty sets out the framework for political ***union.***

[4] In 1967 the separate executive bodies of the of ECSC, the EEC and Euratom were merged, creating the basic institutional structure of what became known as the European Community.

[5] These are: the Treaty of Paris, creating the European Coal and Steel Community (ECSC, 1952); the Treaty of Rome, adding the European Economic Community (EEC 1957) and the European Atomic Energy Community (Euratom 1957).

INDEX

SECTION A: OVERVIEW OF THE EUROPEAN UNION

Introduction	p. 1
Part One: (1) Evolution of the EU	p.1
(2) The Constitution of the EC	p.2
Part Two: The European Institutions	pp.2-10
- The Council of the European Union	p.3
- The Council Presidency	p.4
- The European Council	p.4
- The IGC	p.4
- The Commission	pp.5-6
- The European Parliament	pp.6-10
- The ECJ	pp.11
Part Three: External Relations	pp.12-18
(a) The external relations of the EC	pp.12-15
(i) General	pp. 12-13
(ii) The Community's Relations with Specific International Organizations	pp. 13-15
(b) The external role of the EU	pp. 15-16
(i) Pillar II Activities (CFSP)	pp. 15-16
(c) Challenges posed by the External Roles of the EC/EU	pp.16-18

SECTION B: WORKING WITH THE EU

Part One: Common Values/Objectives	pp.19-25
Part Two:	
(a) The IGC and the Irish Draft Treaty: Trends, Problems and Opportunities	pp.1-9
(b) Selected Irish Draft Treaty Provisions	pp. 9b-31

TO COME

(1) correction of Original Draft and suggestions for reformatting to merge with new sections

(2) section with suggestions on how to reorganize the Problems sections of the Original Draft, together with additional material

(2) The Constitution of the EC

In its structure, the Community order resembles the constitutional order of a State. Its tasks are not the narrowly circumscribed technical tasks commonly assumed by international organizations, but fields of competence which, taken as a whole, form essential attributes of statehood. Of course, a few essential aspects of State sovereignty *are* withheld from the Community, including defence, diplomacy, education and culture, but even in these spheres, certain aspects are subject to Community competence. The similarities between the Community order and that of a State become even more striking in light of the powers (described ***infra***) which are conferred on Community institutions for the performance of the tasks entrusted to the Community.

These powers have acquired a special significance in the conduct of external relations. They enable the Community to assume obligations towards non-member States or other international organizations in fields covered by the list of tasks entrusted to the Community. An outstanding example is found in the *Kramer* case decided by the European Court of Justice. Given the EC's responsibility for fisheries under the common agricultural policy, the Court inferred the necessary ***external*** competence to enable the Community to cooperate with international organizations in fixing fishing quotas and, where appropriate, to assume obligations on the matter under international law.

However, despite the similarities, the Community is ***not a State.*** In particular the Community lacks both the universal jurisdiction characteristic of a State and the power to ***itself*** create new fields of competence. What then is it?

The Community represents a **new form of relationship** between States, something between a State in the traditional sense and an international organization, wherein Member States have pooled certain parts of their own legislative powers and have placed them in the hands of Community institutions in which, however, they are then given substantial rights of participation. The concept of ***'supranationality'*** has become the accepted means for describing the nature of the Community's institutions. This is intended to indicate that the Community is an association endowed with ***independent authority,*** with its own sovereign rights and a legal order independent of the Member States to which both the Member States and its citizens are subject in matters for which the Community is competent.

Part Two: European Union Institutions

As one of the the world's most advanced, complex and unique international organizations, the European Union consists of 15 states interacting within 5 central institutions which are intricately linked and often overlapping or unclear in terms of power and legal competence. The five principle institutions are **The Council of the European Union ('the Council')[6], the European Commission, the European Court of Justice (ECJ) and the Court of Auditors.** These Institutions are characterized by their ability to **'act'**; that is, to **take decisions which are generally binding** within the parameters of the Institution's authority and can be contrasted with the other **main 'organs'** of the Union, primarily the **Economic and Social Committee** and the **Committee of the Regions.** These bodies operate with a **purely advisory** or **non-binding** mandate.

The Council of the European Union (Articles 145-153 EC Treaty)

The **Council of the European Union** fills both a **political and legislative** role within the institutional framework of the European Union. It is the institution in which the governments of the Member States have direct representation with each Member State sending one or more representatives - generally, but not necessarily, the departmental or junior minister responsible for the matters under consideration, such as the Minister for Foreign Affairs, Economic Affairs, Finance, Labour, Agriculture, Transport or Technology.

It is in the Council that the individual interests of Member States and the Community interests are balanced and reconciled. In asserting their respective national interests, members of the Council are at the same time obliged to take into account the objectives and needs of the European Community as a whole. Consequently, it is not the lowest common denominator between the Member States that is sought in the Council's deliberations, but the highest between the Community and the Member States.

The Council fulfils central roles within all three Pillars of the single institutional framework of the European Union, with the nature of its role varying, depending on the Pillar in which it is acting. In connection with matters affecting the **Community (Pillar I)**, Council must "ensure coordination of the general economic policies of Member States"[7]. A key aspect of this role is to ***adopt*** legislation based on Commission proposals. The Council may ***initiate*** legislation, taking on a central role as the paramount legislative body, when acting on behalf of Member States in the

[6] It is also known as 'The Council of Ministers' or simply, 'The Council'. It is not to be confused with **The European Council**, which technically is not an EU institution but a **summit** meeting of its Member States which generally coincides with the end of a Presidency of the Council. See *infra* for a discussion of the role of the European Council.

[7] see Article 145 of the EC Treaty.

areas of intergovernmental cooperation under Pillars II and III, **CFSP and JHA** respectively.

The Council Presidency

The Council is presided over for a period of six months by each Member State in turn, in accordance with a pre-established roster. The **Presidency**, with the assistance of its General Secretariat, determines Council's priorities, and sets and manages the agenda for the ensuing six months. It is the driving force in the legislative and political decision-making process of the Council, organizing and chairing all meetings and working out compromises on difficult issues.

As provided in Article J.5 of the TEU, the Presidency **represents** the Union in matters coming within the common foreign and security policy (**Pillar II**), is responsible for the implementation of common measures and, in that capacity, expresses the position of the Union in international organizations and international conferences. In these tasks. the Presidency is assisted by the previous and next Member States to hold the Presidency, the three thus forming a Troika.

The European Council,[8] consists of meetings *between* the Heads of State and Government of the Member States of the European Union, assisted by Ministers of Foreign Affairs, with the President and one other representative Member of the Commission. This ***summit*** meeting generally coincides with the end of a Presidency of the Council. While formally incorporated within the Community's institutional set-up by Article 2 of the Single European Act in 1987, the European Council is not technically a Community institution. Nonetheless, it has considerable bearing on the *mandate* followed by Union institutions - establishing policy guidelines for European integration in terms both of the Community as such and of political cooperation.

In the Community context (**Pillar I**) it does so by taking basic policy decisions and issuing instructions and guidelines to the Council. In this way, the European Council has directed work, for example, on economic and monetary union and the European Monetary System. In the context of political cooperation, the European Council seeks to direct and to promote agreement on questions of international relations and the coordination of Member States' foreign policies (**Pillar II**).

The **Intergovernmental conference (IGC)** to consider further **institutional reform**, mandated by in Article of the Maastricht Treaty, has been a major agenda item of the European Council meetings in Madrid (December 1995), Turin (March,1996), Florence (June 1996) and Dublin(December 1996). At the Irish Summit an outline draft Treaty submitted by the Presidency was accepted by the European Council as a good basis for further work.[9]

[8] See Article 2 of The Single European Act and Article D of the TEU.

[9] The 1996 IGC is discussed in more detail *infra*.

The Commission
(Articles 154-163 EC Treaty)

The Commission has a central role to play in the institutional structure of the Union: as initiator; as administrator; as mediator; as negotiator; and as guardian of the Treaties. It is vital therefore to the good functioning of the Union that it be both efficient and effective.[10]

In accordance with the terms of the EC Treaty,[11] as amended with each successive enlargement, the Commission is now composed of 20 Commissioners, two each from France, Germany, Italy, Spain and the United Kingdom and one each from the other Member States.[12] In practice, the term, Commission, is loosely used to encompass not only these 20 senior officials but also the entire body of European civil servants employed in the service of the Commission. The majority of them, now numbering nearly 20,000, work in Brussels, the political and administrative centre of the Community and the 'seat' of the Commission.

The main functions of the Commission in relation to **Pillar I** can be summarized as follows:

- monitoring the observance, and ensuring the proper application, of Community law
- ensuring the proper functioning and development of the Common market
- administering and implementing Community legislation, participating in the Community's legislative process, and implementing the Budget
- representing the Community in international organizations and negotiating international agreements
- exercising the powers conferred by the Council to initiate or propose measures for the furtherance of Community policy
- making recommendations and delivering opinions on issues affecting the Community
- publishing an annual report of the Community activities

The Commission is the motive power behind Community policy. It is the starting point for every Community action as it is the Commission that has to present proposals and drafts for Community legislation (the Commissions "right of initiative"). The Commission is not free to choose its own activities but is obliged to act if the Community interest so requires. The Council, and under the Treaty on European

---

[10] So says the opening words of Chapter 16 of the Draft Treaty on the EU submitted by the Irish Presidency in December, 1996.

[11] See Article 157 of the EEC Treaty.

[12] See Annex A for a complete listing of the current Commissioners and their respective responsibilities.

Union, Parliament[13] may also ask the Commission to draw up a proposal.

As guardian of the Community treaties, the Commission sees to it that the treaty provisions and the measures adopted by the Community institutions are properly implemented. Whenever they are infringed, the Commission must intervene as an impartial body and, if necessary, refer the matter to the European Court of Justice.

Closely connected with the role of Treaty guardian is the task of defending the Community's interest. The Commission may serve no interests other than those of the Community and must constantly endeavour, in what are often difficult negotiations within the Council, to ensure that the Community interest prevails. In promoting compromise solutions which take proper account of the Community interest, the Commission, in effect, plays the role of a ***neutral mediator*** between the Member States.

Lastly, the Commission is an executive body. ***Primary*** executive powers include implementation of the Community budget and competition law. In addition, the Commission has been given a crucial role in its executive capacity in the preparation of the economic and monetary union, including oversight and direction of the policy on convergence in the run-up to the third stage of monetary union, and representation of the Community in international monetary relations. The Commission also has extensive *derived* executive powers, devolved on the Commission by the Council, and essentially involving the adoption of the rules necessary for implementing Council decisions.[14]

In relation to **Pillar II** activities, by virtue of Article J.9 of the TEU, the European Commission is "fully associated" with the work carried out in the field of common foreign and security policy and shares with Member States the right to initiate and submit proposals to the Council for decision.[15]

The European Parliament (Articles 137-144 EC Treaty)

The European Parliament is the only Community body that is directly elected by the citizens of Europe. At present there are 626 Members of the European Parliament (**MEP's**), elected for a five-year term of office. Many MEP's have national party affiliations and, as a result of its multi-party, multi-national composition, the Parliament reflects ***both*** Member States and European interests.

Since the 1957 Treaty of Rome, Parliament's powers have gradually grown,

---

[13] The role of the European Parliament, the third of the five Community institutions, is discussed *infra*.
[14] Note, however, that while the Commission may **develop** the rules, it is generally the Member States themselves that have to ensure they are **applied** in individual cases (national implementation).
[15] The sharing of responsibilities among the various Community institutions will be discussed further *infra*, particularly in relation to the **external activities** of the European Community and Union.

particularly since the signature of the Single European Act (1986) and of the Treaty on European Union (1992). Parliament is fully involved in adopting Community legislation and the EC budget; it supervises the activities of the Commission and the Council; and the MEPs represent the interests of the citizen, through the Committee on Petitions, and by appointing the European Ombudsman.

The European Parliament exercises advisory, supervisory and decision-making powers. The Rome Treaties originally provided for the Commission to propose and the Council to decide, after **consulting** Parliament. A Community law becomes null and void if the obligation to consult Parliament is not met. Parliament's role in the legislative process has been gradually widened and strengthened, and its influence extended to the **drafting and adoption of Community legislation**. The European Parliament and the Council now **share the power of decision** equally in a large number of areas.

Parliament can request the Commission to take a particular initiative where it considers it important. Its examination of the Commission's annual programme of work also gives Parliament the opportunity to emphasise its priorities.

There are four possible **legislative procedures** by which the European Parliament may exercise its legislative power, depending on the nature of the proposal concerned: the **consultation procedure**, the **cooperation procedure** (two readings), the **co-decision procedure** (three readings) and the **assent procedure.**[18]

This co-decision power, along with the assent procedure, described below, is at present one of Parliament's most important powers. Under this procedure the Council and Parliament **share decision-making** and Parliament can prevent adoption of a proposal by the Council if its views are not heeded. The co-decision procedure applies to the following areas: the free movement of workers, the establishment of the internal market, technological research and development, the environment, consumer protection, education, culture and health.

Parliament's **assent** is now needed for decisions on the accession of new Member States, association agreements with third countries, the conclusion of international agreements, a uniform procedure for elections to the European Parliament, the right of residence for Union citizens, the organization and goals of the Structural Funds and the Cohesion Funds and the tasks and powers of the European Central Bank.

Parliament also exercises important **decision-making powers** in relation to the Community budget which it establishes in conjunction with the Council and, over most of which it has the final say.

[18] See Annex for a further explanation of these procedures.

In addition to carefully monitoring the expenditure of public funds, Parliament exercises democratic **supervision** over all Community activities. This power, which was originally applied to the activities of the Commission only, has been extended to the Council of Ministers, the European Council and the political cooperation bodies. The European Parliament can also set up committees of inquiry.

Parliament and the Commission

The Treaty on the European Union gives Parliament the power to influence the Commission's membership through the **appointment procedure**. The Commission President is appointed by the Governments of the Member States only after Parliament has been consulted and the Commission is then subject, as a body, to a vote of approval in Parliament. This power is in addition to Parliament's **right to censure** the Commission; the adoption of a 'motion of censure' would force the Commission to resign. On a daily basis, Parliament exercises its **supervisory power** by examining a large number of monthly or annual reports which the Commission is obliged to submit to it In addition, Members of Parliament can put written or oral questions to the Commission.

Parliament and the Council

Parliament's expanded budgetary and legislative powers have increased its influence over the Council. The co-decision procedure, in particular, has helped create a greater balance of legislative power between the Council and the European Parliament.
Relations between the two institutions have developed on a pragmatic basis. The President-in-Office of the Council presents his or her programme to Parliament at the beginning of a Presidency and accounts for the results achieved at the end. Ministers (Council Members) attend Parliament's plenary sessions and take part in important debates and in 'Question Time'.

Parliament and the European Council

The European Council brings together the Heads of State or Government of the Member States and the President of the Commission at least twice yearly. At the beginning of each summit the President of Parliament presents Parliament's positions on the main topics to be discussed. The Council Presidency reports to Parliament after the European Council meeting. Parliament also receives a yearly written report on the progress achieved.

Parliament and the Common Foreign and Security Policy (Pillar II)

Aspects of the common foreign and security policy are regularly debated in the European Parliament. The CFSP is the particular responsibility of the Committee on Foreign Affairs, Security and Defence Policy. The Council Presidency consults the

European Parliament on the main aspects of the common foreign and security policy and ensures that Parliament's views are taken into consideration. The European Parliament is regularly informed by the Presidency and the Commission of developments in the Union's foreign and security policy. The European Parliament can put questions to the Council or make recommendations to it. It holds an annual debate on progress in implementing the common foreign and security policy.

Parliament and cooperation in the fields of justice and home affairs (Pillar III)

Parliament is particularly concerned with the implementation of policies on matters of common interest such as asylum and immigration, tackling drug dependence, fraud and international crime. Parliament is regularly consulted and informed on the cooperation between the justice and home affairs authorities of the Member States of the Union. The European Parliament can ask questions of the Council or make recommendations to it and it holds a debate each year on the progress made in these fields.

ANNEX A: The European Parliament and EU Decision-making

Consultation (single reading)

Parliament's opinion must be obtained before a legislative proposal from the Commission is adopted by the Council. This opinion is intended to influence the Council's decision. The consultation procedure applies, for example, to the agricultural price review.

Cooperation procedure (two readings)

If the opinion Parliament delivered at its first reading is not sufficiently taken into account in the Council's common position, Parliament may reject the proposal at second reading. The Council can overturn Parliament's rejection only by a unanimous decision.

Unanimity is difficult to achieve, and so the Council is frequently obliged to seek conciliation with Parliament to prevent its proposal from being rejected. This procedure applies to a large number of areas such as the ERDF (European Regional Development Fund), research, the environment, and cooperation and development.

Co-decision procedure (three readings)

Here, Parliament shares decision-making power equally with the Council. If Council fails to take due account of Parliament's opinion in its common position, Parliament can prevent the adoption of the proposal.

If Parliament decides to reject the proposal it cannot be adopted by the Council. To prevent this situation from arising, a conciliation committee (made up of Members of Parliament, the Council and the Commission) is convened to seek a compromise before Parliament's third reading. If agreement is still not reached, Parliament can reject the proposal definitively.

11
The European Court of Justice
(Articles 164-188 EC Treaty)

The European Court of Justice is the foremost judicial institution of the Community. Its function is to ensure that, in the **interpretation** and **application** of the Treaties, and of the instruments enacted under them, the law is observed. It therefore acts as a **constitutional court** when disputes between community institutions are before it or the legality of legislative instruments is being assessed; as an **administrative court** when reviewing administrative acts of the Commission or of national authorities applying Community legislation; as a **labour court or industrial tribunal** when dealing with freedom of movement, social security or equal opportunities; as a **criminal court** when reviewing Commission decisions imposing fines; and as a **civil court** when hearing claims for damages. Particularly important, is the Court's **preliminary reference jurisdiction** wherein, upon application by a national court, it may give an advance ruling on the interpretation or validity of points of Community law. This power is essential to the Court's function of ensuring the **uniform interpretation** of Community law by the national courts responsible for its application.

From the outset the Court of Justice has never seen its role as confined to dispute settlement. Regarding itself as a body of creative lawmakers, it has defined the principles on which the Community legal order rests, thereby providing the process of European integration with a firm foundation. **Indeed, it has been described as an integration factor of the highest order.**

A second court, **The Court of First Instance (CFI)**, was set up in 1986. It addresses actions brought by natural or legal persons against actions of **institutions** in all fields except anti-dumping. This court does not exercise a preliminary ruling, reference or appeals jurisdiction. **[should CFI be in a footnote?]**

The European Court of Auditors
(Articles 188a-188c EC Treaty)

Comprised of one member per Member State, appointed by the Council for a six-year term,after prior consultation with Parliament, the European Court of Auditors is the Community body responsible for supervising the European Community budget and auditing the European Union's financial activity in general. The Court must prepare and submit an **annual report** to the other Institutions, on the basis of which, Parliament will decide whether to grant discharge to the Commission from its Budgetary obligations. It is an autonomous body with freedom to decide what it examines and how but has no enforcement powers. Its chief "weapon" is the ability to publicize its findings through its annual report.

Part Three: External Relations

(A) The external relations of the European Community

(I) General

Article 113 - EC

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the *conclusion of tariff and trade agreements*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the case of dumping or subsidies. [*emphasis added*]

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.

3. Where agreements with one or more States or international organizations *need to be negotiated*, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. [*EMPHASIS ADDED*]

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

The relevant provisions of Article 228 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

Article 228.

1. *Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organizations*, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.

In exercising the powers conferred upon it by this paragraph, the Council shall act by a qualified majority, except in the cases provided for in the second sentence of paragraph 2, for which it shall act unanimously.

2. Subject to the powers vested in the Commission in this field, the agreements shall be concluded by the Council, acting by a qualified majority on a proposal from the Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules, and for the agreements

referred to in Article 238. [EMPHASIS ADDED]

At the heart of the Community's external relations is the common commercial policy which gives the Community **exclusive authority** for the **trade policy** of its Member States. The decision by the authors of the Rome Treaty to establish a common commercial policy for its *external* trade was a logical counterpart of the decision to establish the free circulation of goods and services within the Community. One of the consequences of the Community having *sole* responsibility for trade policy is that the European Commission negotiates all *external trade agreements* on behalf of the Community and its Member States. It is the Commission which proposes to the Council of Ministers a draft mandate to negotiate an agreement with a given country or group of countries. Once the mandate has been approved by the Council, the Commission opens the negotiations, coming back to the Council if changes in the mandate are needed. Once the negotiation is over, the Commission can initial the agreement if it considers the outcome satisfactory but its formal conclusion lies with the Council of Ministers, by majority vote.

The free trade principle, contained in Article 110 of the EC Treaty,[17] is at the core of the Community's relations with its trading partners throughout the world. As the world's biggest trading partner, the Community has built up over the years a complex network of multilateral, regional and bilateral trading relationships. Many of these agreements, particularly with developing countries and the States of Central and Eastern Europe, cover financial and technical cooperation, as well as trade. Specific relationships have developed because of geographic proximity (agreements with the EFTA countries, the nations of Eastern Europe and the Mediterranean region), through former colonial ties (the Lomé Convention) or because of similar levels of economic development (the United States, Japan, Canada and other OECD countries).[18]

The Maastricht Treaty also gives the Community general responsibility for development cooperation.[19]

(ii) The Community's Relations with Specific International Organizations

Article 229.

It shall be for the Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations, of its specialised agencies and of the General Agreement on Tariffs and Trade.

The Commission shall also maintain such relations as are appropriate with all international organisations.

---

[17] The text of the Article should be included here.

[18] In this part more info might be provided on the framework agreements between the EC and the US, Japan and Canada respectively.

[19] Cite text of Treaty section.

GATT[20]

Although Member States are the contracting parties to the GATT, because of the common commercial policy, they participated ***as the Community*** In its work. The ***Commission was the EC's sole GATT negotiator and spokesman*** and the Community is now a **signatory** to a number of international GATT agreements.

OECD

As with the GATT, the Community has a **de facto special status** with the Organisation for Economic Cooperation and Development. While not a member of this organization of individual states, the Commission regularly speaks on behalf of the Community on issues of Community competence or where the Member States have agreed a common position.

WTO

All EU member states are members of the World Trade Organization but, pursuant to Article IX, where it is a matter of Community competence (the specific language used is '**where the European Communities are exercising their right to vote**'), the Commission "votes" the number of votes equal to the EU member states of the WTO. On the other hand, where institutional and budgetary matters are concerned (as for e.g. Article IX - Ministerials), individual EU members take the decisions. Similarly, the Commission must **"share"** decision making with the individual EU member states in areas of shared jurisdiction such as trade-related aspects of intellectual property (TRIPS) and trade in services.[21] Nonetheless, for the vast majority of substantive issues, the Commission is in the driver's seat and the EU member states speak with only one voice.

G7

Here the President of the Commission participates as a representative of the Union as a whole[22] at the annual economic summits of the Group of Seven (G7) leading industrialized nations along with the Head of Government of the EC presidency, even when his country is not one of the summit seven.

The Community and the United Nations

The Community is an ***observer*** at the United Nations[23] and in its various agencies and specialized institutions such as UNCTAD, UNESCO, ECOSOC AND

---

[20] It is useful to start with the GATT because it shows the evolution of the EC from this status to that in the WTO.

[21] See the Opinion on Community Competence to Conclude Certain International Agreements (Opinion 1/94) of the ECJ.

[22] The Handbook says this and some other document but the Ext. Relations booklet says both represent the Community!!!

[23] In 1971 the General Assembly adopted a resolution giving the EC observer status.

UNIDO.[24] However, it is a ***full member*** of the Food and Agricultural Organization (FAO) in recognition of the Community's role in world agriculture.

The Community representation at the United Nations is ***dual***; it consists of representatives from the European Commission and the Member State that holds the rotating presidency of the Council of Ministers. This duality reflects the twin nature, political and economic, of international relations. In addition, much of the work of the United Nations, ***even in economic matters***, falls into the gray area between the responsibility of the Community and that of the Member States.

(b) The External Role of the European Union

(i) Pillar Two Activities: CFSP

Unlike the Community, the European Union does not have a legal personality and is unable to conclude international agreements. Nonetheless, the TEU does provide for **representation of the Union on the international scene in relation to Pillar II matters.** As provided in Article J.5 of the TEU, the Presidency **represents** the Union in matters coming within the common foreign and security policy (**Pillar II**), is responsible for the implementation of common measures and, in that capacity, expresses the position of the Union in international organizations and international conferences.

In fact, the TEU envisages broadly three types of activity by the European Union on the international scene, *common statements, common positions and joint actions.*[25] The European Union regularly issues common statements on international developments. Common positions are increasingly a fact of life within the UN and the OSCE. Joint actions, binding on individual EU Member States, have been taken on the former Yugoslavia, on the control of exports of dual-use (military and civilian) goods and on various arms control issues.

While a goal of the CFSP in the longer term is the framing of a common defence policy which might eventually lead to a common defence (Article J.4(1) of the TEU), the present Union is not a defence alliance and does not have any military structures. Rather, decisions with defence policy implications are prepared, and implemented, at the Union's request by the **Western European Union (WEU)**, in which EU Member States are represented either as members or observers. The aim is that the WEU will ultimately form both the European Union's defence component and assume the role of

---

[24] UNCTAD: UN Conference on Trade and Development; UNESCO: UN Educational, Scientific and Cultural Organization; ECOSOC: Economic and Social Council; and UNIDO: UN Industrial Development Organization.

[25] See Articles J.2 and J.3 respectively of the TEU for difference between common positions and joint actions. Note in particular that joint actions

NATO's European pillar.[36] This is in keeping with the EU Treaty which requires the European Union security policy "to be compatible" with the common security and defence policy established with the NATO framework. In 1992 the WEU confirmed NATO's responsibility for collective self-defence and formally decided to confine its operations to peacemaking and peacekeeping, crisis management and protection for humanitarian operations (Petersberg tasks).[37]

(c) Challenges Posed by the External Role of the EC/EU[38]

Many of the difficulties encountered by non-EU countries when dealing with the European Union are caused by the unclear balance of power among, and legal competence of, its institutions.

The exclusive jurisdiction of the Commission in the area of the Community's common commercial policy is derived from Article 113 of the EC Treaty, which contains neither a definition of the *scope* of commercial policy, nor an exhaustive list of the specific areas it is intended to encompass. This absence of clarification has led to differing views among Member States, the Council and the Commission as to the extent of the Commission's competence and to a growing number of areas where the European Court of Justice has found that jurisdiction must be shared between the Commission and Member States of the Union. For example, a 1994 ECJ Opinion on the question of competence to conclude the Uruguay Round Agreements, found that, while unquestionably the Commission had the sole competence with respect to the multilateral agreement on trade in ***goods,*** there was a **shared** competence between the Community and the Member States in connection with the agreement on trade in services (GATS) and the agreement on trade-related aspects of intellectual property rights (TRIPS). It should be noted that the negotiation of these Agreements was conducted by the Commission alone. However, Council, in authorizing this approach to ensure 'maximum consistency' in the conduct of the negotiations, specifically did so without prejudice to the question of the competence of the Community and the Member States on particular issues.

The lack of clarity in the EC Treaty and the resulting divergence of views between Member States and the Commission has led the latter to take an ad hoc, incremental - and largely opportunistic - approach to the issue of its representation and voting rights in international organizations - what some might term "jurisdiction creep" In turn, this has evoked equally ad hoc, and even inconsistent, responses from

---

[36] Note here that the membership of the EU is different than that of NATO, the former including also the European neutral and non-aligned countries of Ireland, Austria, Finland and Sweden.

[37] An example of the WEU's role can be seen in the police contingent it provided for the European Union's joint action on the administration of the Bosnian city of Mostar.

[38] Note that these challenges/problems are presented both from the perspective of the EU in pursuing its work and from that of third parties seeking to deal with the EU and its member states.

the rest of the international community.[29]

The Commission publication, "Europe in a Changing World: The external relations of the European Community", candidly acknowledges that the "unique" nature of the Community - more than an intergovernmental organization but less than a sovereign State - makes its specific international role more "difficult" as does the limited nature of its ***political*** powers in contrast to its wide capacity in the economic sphere. **On the institutional side, the way that responsibilities on external issues are shared between the EC and Member States can cause problems for *both* the Community and its partners.** The publication even goes so far as to say that the seeming ambiguity of decision-making procedures within the Community institutions has "generated suspicion and even, in some cases, hostility" among its partners.[30]

The delineation of responsibilities between the Community and the Member States became increasingly difficult to discern in the area of **European political cooperation (EPC).** The Member States of the Community decided to add a ***political*** dimension to their cooperation in 1969, formally launching the activity in 1970 with regular meetings of Foreign Ministers. In the Single European Act of 1987, the EPC practice was codified and a secretariat established in Brussels. EPC was therefore, from the outset, an **intergovernmental activity,** quite distinct from the supranational structures of the Community. Although 'Fully associated' at all levels (both official and ministerial) with the internal work under EPC and the political dialogue with third countries through the so-called Troika mechanism, role of the Commission was more dispersed and discreet than as the initiator and executor of policy decisions under Pillar I. In this context the primary role of the Commission was to uphold and exercise its economic competencies in EPC.

The ***separation*** **of economic and political responsibilities**, however, is often belied in practice, as, for example, in the case of economic or other sanctions imposed on a country or countries by the United Nations.[31] The lack of any clear dividing line between 'economic' and 'political' issues, coupled with the desire of many of the Community's trading partners to develop a parallel political dialogue, has **accelerated the blurring of the distinction between EPC and Community activity.**

The Maastricht Treaty, recognizing the need for the Union to have an international political dimension in keeping with the degree of internal and external commercial, economic and monetary cohesion that the Union is acquiring, lays down

---

[29] This lays the foundation for the specific problems discussed in the original draft relating to various WIPO conferences. See pages 4 and 5 including, in particular, the footnotes.

[30] **The aim here is to introduce an element of common problems between EU and non-EU member states as a basis for dialogue on overcoming them.**

[31] In such cases, a political decision by the Council is not sufficient but in addition a Community act, based on a proposal from the Commission, is required for the implementation of such sanctions in EU Member States.

a framework, under Pillar II, for the definition and implementation of a common foreign and security policy for the Union. As with the EPC, the Commission is fully associated with this work but, for the first time, enjoys a **right of initiative**, equal to that of the Council. However, as noted earlier, the Maastricht Treaty stops short of endowing a legal personality on the EU.

As discussed earlier in the section on the External Relations of the EC/EU, representation at the UN is "dual", consisting of representatives of both the Commission and the Council Presidency. On the one hand, this duality ***facilitates*** the handling by the Union of questions lying on the margin between international economic policy and foreign policy. However, for an organization like the EC, with exclusive competence to act in certain areas of economic policy, restriction to observer status - without the right to vote, present or amend proposals - poses some difficulties. Similar issues arise as regards the Community's participation in the wide range of multilateral agreements and conventions drawn up under UN auspices on such matters as trade in primary commodities, The Law of the Sea and the environment. Not unsurprisingly then, the Community has been anxious to address this issue and has met with some success in so doing for it is now a party to more than 50 such international agreements, where in each instance, it is the only non-State entity to participate.[32]

A further problem which arises with the shared nature of responsibilities as between the Community and individual member states lies in the area of **enforcement.** Unless the Community has used its **external competence** to accede to international obligations/conventions (via a negotiation authorized by the Council, conducted by the Commission and overseen by an Article 113 Committee), **the provisions of such Conventions do not form part of Community Law** and therefore cannot be enforced by the Community. Only those Member States who have acceded in **their own right** will be under obligation to enforce such instruments at the **national** level

[32] See for eg. The Vienna Convention and the Montreal Protocol on the Protection of the Ozone Layer.

SECTION B: WORKING WITH THE EU[33]

Part One: Common Values/Objectives:

(i) EC & Maastricht Treaty Objectives

EC Treaty

Article 2.

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Maastricht Treaty (TEU)

ARTICLE B

The Union shall set itself the following objectives:

- to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;
- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence;
- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;
- to develop close cooperation on justice and home affairs;
- to maintain in full the "acquis communautaire" and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.

---

[33] The aim here is to identify common values and objectives between the EU and third parties, as found first in the EU treaties, next in relation to international organizations in which EU member states and/or the EU as well as Canada are members and thence to the specific Canada-EC/EU agreements: the Agreed Framework, TAD, and the Action Plan.

The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the condition and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 3b of the Treaty establishing the European Community.

Regarding Pillar I

The TEU makes no changes to the fundamental commitment in Article 110 of the EC Treaty to an open world trading system (i.e. the so-called " free trade principle"):

> **Article 110.**
>
> By establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.

With these Treaty provisions in mind, it is interesting to see how the EU *itself* describes its key objectives on the international scene in the publications it prepares for public dissemination. Typically, under headings like **"A deep attachment to multilateralism",**[34] the Community's enthusiastic support for the multilateral trading principles of the GATT and the WTO is described, the free trade principle contained in Article 110 of the EC Treaty is stated to be "at the heart of the Community's relations with its trading partners throughout the world." and the Community's **leadership role at the multilateral level in the field of global trade-liberalizing negotiations** in the GATT and in North-South relations in the UN context is proclaimed. T

Joint Canada-EU Action Plan[35]

The overall aim is stated to be to **"strengthen and expand Canada-EU relations."**

Regarding Pillar I:

Under a section entitled "Economic and Trade Relations", a **joint commitment** is made to **strengthening the multilateral trading system.**

---

[34] See for example "Europe in A Changing World, The external relations of the European Community", pp.19 and ff.

[35] See all the Transatlantic Declaration which sets out shared values and objectives. Note too that objectives in relation to specific international fora are discussed in that context *infra*.

Pillar II

Article J.1.2 of the Maastricht Treaty states:

2. The objectives of the common foreign and security policy shall be:

- to safeguard the common values, fundamental interests and independence of the Union;
- to strengthen the security of the Union and its Member States in all ways;
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter;
- to promote international cooperation;
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

- Clearly the last three objectives, and particularly the third with its reference to the principles of the United Nations Charter, offer - at least in theory - a strong basis of common values and objectives between Canada and the EU.

Joint Political Declaration on Canada-EU Relations
The Declaration includes the following:
- shared commitment to strengthening the transatlantic relationship and to the security and stability of Europe, the extension of democracy, respect for human rights and the rule of law in the wider world
- common interest in promoting peace-keeping and peace-building measures
- shared commitment to working through relevant international organizations and implementing preventive diplomacy in conformity with international law
- in the spirit of the commitments and mechanisms identified in the 1990 Transatlantic Declaration, **areas for common consultation and action will be jointly identified and periodically reviewed.**

Joint Canada-EU Action Plan:
- general commitment to strengthening cooperation on global issues including, 'wherever possible, **coordinating more closely** their positions in all appropriate **UN** bodies, including specialised agencies, and subsidiary organs of the UN, in the spirit of transatlantic relations.'

- in relation to "Global security, disarmament and non-proliferation", there are commitments to **cooperate and to coordinate efforts** in relation to the non-proliferation of NBC as well as the identification of **agreed objectives** to work towards including a fissile material ban for weapons purposes, greater restraint and transparency in conventional arms transfers and cooperation to further strengthen CUSHIE and the elimination of the irresponsible use of landmines.

Regarding Pillar III: Justice and Home Affairs

There are no objectives ***per se*** regarding Pillar III. However, we are linked with EU in common cause in that international ***cooperation*** is required to deal effectively with international crime. This is not an area where they can dictate positions to us.

The EU and Human Rights: A Basis for Common Objectives?[36]

- In 1995, Commission President, Jacques Santer, for the first time ever, presented two communications on the European Union's policy on human rights to the Council and Parliament. He emphasized that the TEU marks a new phase in the EU policy on human rights and democratic principles. For the first time, Community action in this area is based not on the preamble but on the body of the text, in his view, "one of Maastricht's greatest innovations". **Respect for human rights is a basic principle informing all the Union's activities.** With regard to external action, one of the main objectives of the common foreign and security policy is to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms. The same principles are also stated to apply to the Community's development policy.

- In Santer's view, these provisions constitute a "decisive advance" in the development of an essentially economic Community into a political body. He also notes the important role that the **European Parliament**[37] has played in the incorporation of a 'human rights dimension' in the Community's external relations.

- He then goes on to outline the contribution that the EU has made to the promotion of human rights on the international scene. In the UN bodies concerned with human rights, he asserts that the Union's contribution "has progressively gained in substance and impact." The EU cooperates closely with the UN High Commissioner for Human Rights and the Commission maintains close operational ties with the UN Human Rights Centre, the OSCE Bureau of Democratic Institutions and Human Rights etc.

- In a concluding section entitled "Cooperation with various partners", Santer states:

> " If the Union's actions are to be effective, our partners - regional and international bodies, national authorities and grassroots organizations - must be involved in an open

[36] Note that, there is some confusion as to which Pillar the subject matter of Human rights properly belongs. The Commission maintains that it is Pillar III but this would appear to make sense only in relation to human rights matters internal to the Union. Otherwise, it would appear to be more properly an issue belonging to Pillar II.

and constructive dialogue that generates synergies and ensures that the different measures taken by these bodies complement one another. Human rights are the province of a number of international organizations, and it is important that we benefit from the expertise and experience of each of them in order to avoid duplication or even conflicting positions."

Action Plan: general commitment to strengthening cooperation on global issues including, 'wherever possible, coordinating more closely their positions in all appropriate UN bodies, including specialised agencies, and subsidiary organs of the UN, in the spirit of transatlantic relations.'

- re **human rights** in particular: under the heading, Human rights and democracy, there is a commitment to "consult bilaterally and within the framework and the relevant bodies of the UN, especially the UN Commission on Human Rights, on human rights issues in general and particularly on measures to apply to countries where human rights are being violated;" Note, however, that there is **no specific** reference to consultation with respect to **resolutions.**

- in light of the recent role of the Commission in the area of human rights and the longstanding interest of the European Parliament, the question arises as to whether **Canada can make common cause with the European Parliament in** particular in relation to specific human rights objectives and, if so, how bearing in mind the considerable difficulties we have had with the EU in the past,38 particularly in relation to UN CHR resolutions
- see also the discussion, *infra*, in Section B, on the proposed flexibility mechanisms set out in the Outline Draft Treaty presented by the Irish Presidency to the Dublin European Summit in December, 1996, which, if they materialize, could provide a basis for working with EU likeminded on human rights issues - as we used to do in the past;

United Nations as a whole
- as noted earlier, the **EU's CFSP is explicitly to be in accordance with the principles of the Charter of the United Nations**

- does this help us in terms of the argument that the way the EU is operating in the UN is undermining the ***efficient functioning of the UN;*** (note that one of the arguments in the "Parameters of the Project" document which this Study was to explore is that the raison d'etre of international organizations, particularly within the UN family, "is to protect international common interests through the generation of consensus. This consensus was not meant to be dictated by the European interest."[39])

- can we derive from the UN principles themselves an argument about generating consensus versus dictating positions; that is, about the appropriate **balance of**

[38] See for example the discussion in the Original Draft in the Section entitled, :Western Group/WEOG: Geneva.
[39] See the Contract Proposal section entitled, "Parameters of the Project".

power within and among groups in international organizations?
- **The point here is that while this position may be axiomatic for Canadians - believers as we are in multilateralism - it is not at all clear that this view is shared, particularly by those with considerable more weight than Canada to throw around.**

- if we turn to the UN Charter, key words of the preamble are 'WE THE PEOPLES OF THE UNITED NATIONS...HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS"

-Chapter I, Article I.3 includes among the purposes of the United Nations, the achievement of **international co-operation** in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all
- and Article 2.1 includes among the principles governing actions of Member States, that of the sovereign **equality** of all the UN's members

-at its most basic, then, the United Nations Charter represents a **set of principles for international collaboration to achieve agreed objectives**
- and, an examination of the practice of the UN reveals that cooperation through the development of a broad consensus in relation to the issue at hand is the "ethos", the modus vivendi, of most of the UN system,
- most of the main Committees, for example, work by consensus, although the rules provide for voting (eg. Second and Third Committees). Even in the First Committee where there is voting on approximately 50% of the resolutions, the ***goal* is consensus.**

WTO
- obviously shared Canada/EU objective of free trade (in theory, anyway, although, in relation to specific sectors, this commitment might well break down...)
- **Action Plan:** under a section entitled **Economic and Trade Relations,** a range of commitments of various types are made including **strengthening the WTO** by specific types of cooperative action.
- see, for eg. the commitment under I,1.(d) to "*address together*, in the WTO and other international fora, the **new issues on the trade agenda...**" including joint objectives in relation to the environment, investment, competition and labour standards.
- commitment to *cooperate* to ensure the full implementation of the TRIPS Agreement and to improve the level of **IPR** protection throughout the world (a commitment is also made re IP in **WIPO**, see below)

OECD
- its convention charges the organization with promoting policies designed to achieving the highest sustainable growth and employment and a rising standard of living in Member countries

- contributing to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations
- has 27 member countries in North America, Europe and the Asia Pacific; collectively these countries produce more than half the world's goods and services and its Members include most of the world's largest economies
- in response to the criticism that it is a forum of "rich countries", the OECD states that membership is determined by what the Members have in common - which is their commitment to an open market economy, pluralistic democracy and respect for human rights
- the scope of the OECD has evolved from its original focus - building the economies of its own Member countries - to also fostering interaction between Member countries and the increasingly-important non-Member economies outside the OECD, in the former Soviet bloc, Asia, Latin America and Africa. The purpose of the OECD's interaction with non-Members is also to promote the sound development of those countries' economies and institutions

- The work of the OECD covers a wide field of macro and microeconomic issues as well as monetary and financial matters and, increasingly since the 1970's, energy questions. The OECD has also been instrumental in pushing forward discussions by members on issues like trade in services and high-technology products, often in advance of these issues being pursued in more formal binding negotiations in the broader GATT,now WTO, framework.

- note: see the discussion in the **Original Draft** -at pages 7-9 of the problems we have been encountering in the OECD with respect to European domination of both the agenda and the selection of Chairs. Against this negative experience, should be included the **recent success that Canada has had** in relation to the Development Assistance Committee and its focus on military expenditures in developing countries, including a seminar jointly hosted by Canada and the DAC, over the objectives of France.

-See also the **Action Plan commitments including under <u>New Issues on the trade policy agenda</u> the commitment to "address together, in the WTO and other international fora" the new issues including: MAI in the OECD**

NATO

- note that there is no NATO section in the original draft but I have notes which could easily form the basis of a brief section thereon, basically indicating why there is no EU caucusing within the North Atlantic Council and subsidiary groups

Part Two: THE 1996 IGC AND THE IRISH DRAFT TREATY: TRENDS, PROBLEMS AND OPPORTUNITIES[1]

- Refer first to the Statement by the Irish Foreign Minister to Parliament on the outcome of the Dublin European Council, where the outline Draft Treaty was put forward by the Irish Presidency

- there the FM indicates that the outline draft Treaty was "... accepted by the European Council as a good basis for the work which lies ahead."

SECTION II: THE UNION AND THE CITIZEN: INTRODUCTION and **CHAPTER 8. TRANSPARENCY**

- comprehensibility and **transparency** of the Union to its citizens is expressed as a primary aim of the current IGC
- as well as giving Union citizens greater access, the proposed amendments also include **legal persons residing in a Member State**, and this would therefore include Canadian business entities
- more broadly, however, increased transparency in the workings of the Union Institutions would be useful to all third parties seeking to deal with the EU; **in this respect, non-EU members share a COMMON INTEREST with the citizens of the EU in promoting greater transparency**
- this leads to a potential role for Canadian parliamentarians

SECTION III,: AN EFFECTIVE AND COHERENT FOREIGN POLICY

Chapter 10: The Common Foreign and Security Policy: Objectives, Means and Structures

- "Mr. CFSP"

-Note first that the Presidency proposal for a Mr. CFSP is that it be a **bureaucrat - the Secretary-General of the Council who will, in fact, replace the current third (political) member of the Troika which is thus reduced to the current and future Council Presidents (per the proposed amendment to sub-para (4) of Article J.5).**

- for our purposes, the key point is that the Secretary-General, on request of the President, may undertake tasks relating to the external representation of the Union, including conducting **political dialogue with third parties**

---

[1] For convenience, the Outline Draft Treaty put forward by the Irish EU Presidency at the Dublin Summit in December, 1996 will be referred to as the "Irish Draft Treaty". **Note that the Dutch Presidency has carried on this work, and this needs to be examined. Most of the relevant sections of the Irish Draft Treaty - including both proposed amendments to the TEU and the discussion thereon - are included at the end of this Section.**

- this offers the prospect of an "interlocuteur valable" for third parties to raise on a systematic basis concerns in dealing with the EU

- in such a dialogue, not only can commitments under other documents - such as the Action Plan - be raised AND common objectives of the EU and third parties in respect of the UN Charter or the aims of various organizations (as set out in the Common Objectives/Values section of this paper), but **Community/Union objectives that are being compromised by "lowest common denominator" positions can be discussed**

- in other words, there is the prospect of being able to make the case - to a senior Union official with responsibility therefore - that the **Union interest** requires a position to be adopted which is the **highest possible** between the Union and Member states in order not to frustrate key objectives of the Union itself.[2]

- add to this argument, the possibility of **"flexibility mechanisms"** such as the constructive abstention proposed in the Irish Draft (see Draft new Article J.8a), and the possibility does exist for progress

Constructive Abstention

- the possibility of a smaller group of likeminded EU member states being able to decide on joint actions without being blocked by the **rest opens up the possibility at least for Canada (and other JUSCANZ) members to "find" some of their "lost" likeminded once again**

- mitigating against this happening, however, will be the ever present fear in the Union that "flexibility" mechanisms will lead to the inevitable **unravelling** of Union policy coordination; and note that the Irish Draft, in addition to proposing flexibility mechanisms in the context of the CFSP, also proposes to amend Article J.1(4) to include a so-called **"reinforced political solidarity clause"**

- however, the flexibility mechanism does offer a real **lever** for more progressive members of the Union to argue - internally - that if there is serious concern about disunity among those blocking meaningful action, then there ought to be a real effort at a **middle ground position** (between the lowest common denominator and the preferred option of the smaller number)

- how non-EU members - particularly JUSCANZ play into this debate should be a subject of consultations both among JUSCANZ members and between JUSCANZ and the EU

- a key issue, as always, will be how to ensure that third party interests are taken into account while the policy in question is being developed

---

[2] See, for example, the discussion in *The ABC of Community Law*, by Klaus-Dieter Borchardt, Periodical 1994 at page 10, on the "highest common denominator" principle which is SUPPOSED to be applied in Pillar I issues. The argument here is that, it can and should now become a principle to be applied in the case of the CFSP as well - particularly in light of the proposed flexibility mechanisms.

Chapter 11. EXTERNAL ECONOMIC RELATIONS

- in order for the Community to be able to act effectively in a highly competitive international trade environment and, in particular, to be able to conduct effective multilateral negotiations in the global system of the WTO and an evolving environment, the Irish draft proclaims a "wide measure of support" for amending the TEU to provide for a **limited extension of external Community competence** (by a transfer of internal competence from Member States to the Community) in respect of the negotiation and conclusion of agreements in multilateral international organizations on **services, intellectual property** and **direct foreign investment. (note that the IMF and the World Bank are excluded)**

- the effect of these proposals would be that the Community would be the sole negotiator, subject to the appropriate control by Member States (that is , as with other areas of exclusive Community jurisdiction, the Council would authorize the negotiation and its mandate and would oversee it and approve the resulting agreement, with no need for **national** ratification procedures.)
- the TEU would also be amended to include a Declaration that the Commission conduct its negotiations with **maximum transparency** vis-à-vis Member States

- but note that the Irish Draft also acknowledges a **range of views** on the issue from going further in relation to dealing with matters of shared jurisdiction under Pillar I to maintaining the *status quo*.

- these proposals obviously demonstrate the TREND towards further strengthening the power of the Commission in Pillar I matters, at the direct expense of Member States

- however, the Member States, via the Special Committee procedure, still have very considerable **oversight**;
- these proposals would mean, however, that action by third parties to influence policy in these areas of previously shared jurisdiction will, of necessity, shift almost exclusively to BRUSSELS from such fora as the OECD, where the multilateral "pre-negotiation" is actually taking place, underscoring even further the need to increase our presence there [as recommended in the Original Draft in the Section on **Dealing with the EU in Brussels**[3]

[3] This is at page 12 of the Original Draft and the section focusses on Pillar II matters but is of equal relevance in terms of influencing in relation to Pillar I.

Chapter 12: SECURITY AND DEFENCE

- the proposals in this area are cautious, reflecting a middle course between those who wish to proceed to an unqualified definition of a common defence policy and those who want the existing wording retained.

- The current wording of Article J.4(1) reads as follows:

> 1. **The common foreign and security policy shall include all questions related to the security of the Union, including the *eventual framing* of a common defence policy, *which might in time lead to* a common defence. [emphasis added]**

- It is proposed that it be amended to read as follows:

> 1. **The common foreign and security policy shall include all questions relating to the security of the Union, including the *progressive framing* of a common defence policy *in the perspective of* a common defence. [emphasis added]**

- the President's text would incorporate the **Petersburg Tasks** - humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking - in the Treaty as part of the Union's objectives in security and defence; i.e. **formalize the agreement already reached as to the division of labour between the WEU and NATO,** insofar as EU Member States were concerned (i.e. agreement among WEU/EU that collective security tasks would be left to NATO)[4]

- the President's text would also make explicit that **unanimity** applies for Union (Council) decisions having **military or defence implications**

Chapter 13. LEGAL PERSONALITY OF THE UNION

- the Irish Presidency's text would **endow the Union with legal personality** in the same manner that the Community has;
: internally, the Union would be represented by the Commission
- in its **external** relations, the Union would be represented by the Presidency of the Council

---

[4] Note that neither the Original Draft of the EU Study nor the revisions include a section on the impact on NATO - and Canada's interests therein - of EU integration - other than the references here in the IGC discussion. However, interviews were done, and notes compiled, on this aspect if there is interest in including it. The overall conclusion, to date, is that there is no "EU" caucusing in the North Atlantic Alliance nor a prospect thereof in the foreseeable future. Canada's foremost problems lie elsewhere - that is, within diminished influence as our contribution to NATO has diminished.

- among other things, this means that the Union, like the Community, would have the **power to conclude international agreements** by means of a procedure requiring the authorization of Council and negotiating directives of the Council acting unanimously

- Note, first that the Presidency concludes that, if his proposal to endow the Union with legal personality is accepted, then it "would be logical to consider **merging the existing legal personalities of the three Communities and of the Union into a single legal entity" without affecting the existing structures of the Union**
- no language, however, is proposed and it is to be noted that there are those who oppose any change other than giving the Union the capacity to conclude international agreements. (i.e. they do not agree even with giving it a legal personality let alone merging it with that of the three Communities)

- note too, that if the merger were to take place, it would mean that the **current usage** of "Union" **even when Pillar I activities of the EC are being discussed** would be in conformity with the actual legal situation.

- THIS PROPOSAL IS PERHAPS THE MOST TANGIBLE EVIDENCE OF THE TREND TOWARD DEEPENING POLITICAL COORDINATION IN PILLARS TWO AND THREE AND THE EFFORT TO MAKE THE CFSP IN PARTICULAR MORE CREDIBLE AND EFFECTIVE

SECTION IV: THE UNION'S INSTITUTIONS

S- in the "Introduction" to "the Union's Institutions", among the relevant aims for our purposes is that of making the institutions of the Union more **transparent** to its citizens (and, consequently to third parties); the implications for this aim have been discussed earlier

- another institutional aim is to **fully recognize the central role of the European Parliament** by **expanding its "co-legislator" role with Council** to new areas, by simplifying the procedure to make it more efficient and understandable and, most importantly, by **putting the EP on the same footing as the Council** by removing the last stage of the current co-decision procedure whereby Council can confirm its common position if no agreement is reached between Council and the EP in the Conciliation Committee; (and note that the EP has said that, even if the procedure is **not** amended, it will in any event reject any common position so confirmed)

- but note that there is **no agreement on what criteria should be used to determine the new areas where co-decision should apply**

- the political role of the European Parliament is also to be strengthened by providing that it must approve the nomination of the President of the Commission

-IS THIS AN OPPORTUNITY OR A PROBLEM? INSOFAR AS THE DECISION-MAKING ROLE OF COUNCIL IS DILUTED BY FURTHER EXTENSION OF CO-DECISION MAKING WITH PARLIAMENT, THIS COULD SLOW DOWN DECISIONS AND INTRODUCE A WHOLE NEW RANGE OF "WILD CARDS"

- on issues where Parliament has been historically hostile - like fur trapping - an increase in its role could be problematic
- insofar as the Parliament is more accessible and can be lobbied, this might open greater opportunities for **common cause** between Canadian and European business groups

- in an area like **HUMAN RIGHTS**, where the **European Parliament** has essentially been the lead, **they might prove to be an important ally** in avoiding lowest common denominator positions by the EU - especially if the CFSP flexibility mechanism is adopted - making individual Member States more susceptible to public - and national Parliamentary - pressure since they cannot so easily hide behind EU "unity" and unanimity

- one thing is sure: **an increased role for Parliament will mean more attention must be paid to it and that means more resources;**
- SO THE KEY POINTS ARE (1) MORE RESOURCES - MANY MORE - REQUIRED TO ADEQUATELY FOLLOW THE EP AND (2) POLITICAL - and Canadian Parliamentary LEVELS MUST BE MORE INVOLVED AND (3) UNPREDICTABILITY GREATLY INCREASED but (4) POSSIBILITIES FOR COMMON CAUSE WITH THE LIKEMINDED ALSO ENHANCED

- **NOTE ALSO THAT Chapter 19.** seeks to modestly enhance the current ability of national Parliaments to "express a collective view at the level of the Union"

Chapter 15: THE COUNCIL

- issues raised in Chapter 15 of the Irish Draft Treaty relate to the **scope of qualified majority voting,** the weighting of votes and the threshold for qualified majority voting decision-making
- it is agreed to be **the most sensitive area** which should be left to later stages of Conference
- **regarding the scope of qualified majority voting under Pillar I, one view believes there should be a very substantial extension while another opposes any significant change while some see this issue as depending at least in part on what is agreed regarding the re-weighting of votes**

- regarding re-weighting, one view is that re-weighting is required to ensure that, as the number of small and medium sized countries joining the Union increases, the proportion of the Union's population represented by Member States required to constitute a qualified majority does not continue to decrease
- a counter view is that there is no need for change as all smaller States would not act collectively against the larger states and that, in any event, in all conceivable cases, a qualified majority (as currently calculated) would still constitute a majority of the population of the Union and that the role of the European Parliament in representing the population of the Union must be taken into account

- regarding the first issue of possibly increasing the scope of qmv under Pillar 1, any diminution of the requirement for consensus in Council (that is, any increase in qmv) is likely to be helpful to third parties
- this complements the proposals for flexibility in the CFSP

- conversely, **ANYTHING WHICH MAKES IT HARDER TO ACHIEVE A QMV - WHICH WOULD BE THE RESULT OF RAISING THE THRESHOLD - IS LIKELY TO MAKE IT MORE DIFFICULT FOR NON-EU MEMBERS**

CHAPTER 16. THE COMMISSION

- the main point here is that the aim is to **strengthen the powers of the President of the Commission** to make the Commission more effective

- This is a double-edged sword for third parties, but is probably, on balance, better (at least on Pillar I issues), given the generally free-trader bent of the Commission

- note in particular proposals that, if adopted, would give the President of the Commission the **power both to select, and perhaps to dismiss, individual Commissioners** in certain circumstances as well as an explicit right to allocate and re-shuffle portfolios

- such a power **could possibly help counter obvious bias** on the part of Commissioners, particularly political bias, as with Bonino in the Canada-Spain fish dispute

Chapter 18: OTHER INSTITUTIONAL ISSUES

- note here that there is a proposal to provide for **Community budgetary provisions** to apply to **financing under the CFSP** and Justice and Home Affairs, while providing for national financing in specific cases
- obviously, this removes a **big hurdle in the development of a CFSP**

Section V: ENHANCED COOPERATION - "FLEXIBILITY"

- as we have seen earlier, the Presidency draft includes **two specific flexibility provisions**, a constructive abstention in the context of the CFSP (Section III, Chap 10) and in relation to JHA, explicit provision for conventions relating to Pillar III matters entering into force for a limited number of countries (Section I, Chapter 3)

- these two proposals - with specific Treaty language - fall into the first category of flexibility discussed in Section V - **when individual acts or decisions are adopted in certain policy areas**

- Section V then goes on to discuss **two other types of flexibility where no specific language is proposed**

(1) provision for flexible cooperation in a specific area by detailing all relevant provisions in a Protocol of the TEU as for eg. if the Schengen Agreement were incorporated into the Treaty and

(2) a more general approach to flexibility with the Treaty setting out general provisions defining **conditions** for enhanced cooperation and specific clauses in relevant parts of the Treaty relating to the application of flexibility in relevant areas (i.e. general clause setting out the principle of enhanced cooperation, general conditions to be respected in all cases of ec and detailed enabling provisions in relation to specific areas

- a number of important **subsidiary questions** remain to be discussed including the number of states needed to decide whether enhanced cooperation will be established in a particular area, what role the Commission should have, what the minimum number of participating states should be for the enhanced cooperation to proceed, whether certain areas, for example the internal market, should be excluded a priori, what the financing arrangements would be and what provisions would enable non-participating States to join at a later stage.

- Obviously, this is one of the most promising opportunities for Third Parties arising from the Draft Treaty;
- also see earlier comments in relation to the CFSP flexibility mechanism regarding the potential impact on third parties of recovering some of their lost "likeminded ' and, particular, in allowing for more substantive positions to be pursued (and therefore for us to make common cause)

- this approach might allow the new entrants such as Austria and Sweden, so squelched up to now, some real breathing room

- it should also give the moderates some real leverage in getting recalcitrants to move to a more reasonable position because, if they don't, the smaller group will go ahead with an even more far-reaching position
- for that reason, it seems hard to believe that the EU "heavy-weights,"

particularly the UK and France, would allow this to happen

- THIS IS THEREFORE AN AREA TO MONITOR MOST CAREFULLY

-30 -

SELECTED SECTIONS OF DRAFT IRISH TREATY

SECTION II: THE UNION AND THE CITIZEN: INTRODUCTION

Making the Union more relevant and comprehensible to its citizens is a major aim which runs through the work of the Conference and is reflected in all chapters of this document.

Section II addresses a number of issues which affect citizens in their daily lives and how they perceive the Union and its institutions.

- People want the opportunity to work.
- They want a decent society not just for themselves but for all.
- They want to live in a clean environment.
- As consumers living in the largest market in the world, they want adequate protection.
- **They want the institutions of the Union, of their Union, to be comprehensible and transparent.**
- They want the Union to play the role which it must play in certain areas while leaving for action at the level of Member States matters which are more properly addressed at that level.
- Their citizenship of the Union complements and does not replace their national citizenship. **[emphasis added]**

CHAPTER 8. TRANSPARENCY

I. The issue

Greater **transparency and openness** in the operation of the Union and its institutions are essential in order to ensure that the Union is understood and accepted by its citizens. It is important to reinforce the progress already made by including in the Treaty appropriate provisions designed to achieve this. **[emphasis added]**

The text suggested by the Presidency which follows would:

reflect the principle that decisions of the Union should be taken as openly as possible;

incorporate provisions in the Treaty allowing a right of access to European Parliament, Council and Commission documents, and providing that when the Council acts as a legislator the results of votes and explanations of votes shall be made public.

II. Texts

Amend the second paragraph of Article A of the TEU

This Treaty marks a new stage in the process of creating an ever closer Union among the peoples of Europe, in which decisions are taken **as openly as possible and as closely as possible to the citizen.**

New Article 192a in the TEC

Any citizen of the Union, and any **natural or legal person** residing or having its registered office in a Member State, shall have a **right of access** to European Parliament, Council and Commission documents, subject to conditions which shall be laid down by each of these institutions under its own rules of procedure. **[emphasis added]**

General principles and limits governing the exercise of that right may be determined by the Council, acting in accordance with the procedure referred to in Article 189b.

Addition to Article 151(3) of the TEC

concerning the Rules of Procedure of the Council:

The Council shall lay down in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.

SECTION 111: AN EFFECTIVE AND COHERENT FOREIGN POLICY: INTRODUCTION

1. Despite the fact that it is the world's largest trading entity, the European Union is not as effective as it should be in using its diplomatic influence and its economic capacity in relations with third countries and in promoting peace, stability and prosperity in the world. One of the Conference's top priorities must be to make the external policies of the Union more coherent, effective and visible.

2. The proposed Treaty changes set out in Section III are designed to address this challenge and to ensure that the political and economic aspects of the Union's external policy are consistent, coherent and mutually reinforcing. The main elements of the approach set out in this Section are as follows:

3. More effective policy structures would be introduced under the common foreign and security policy and continuity would be improved in a number of ways. There would be improved support structures to assist the Presidency. There would be better preparation of decisions and more focused policy implementation. Overall consistency would be strengthened by closer involvement of the Commission. Decision-making procedures would be significantly improved.

4. In its external economic relations, the Community would be able to act more effectively in multilateral international organizations, notably in the World Trade Organization, to defend the interests of its Member States, its industry and workers in today's highly competitive international trading environment.

5. The Union's objectives in security and defence matters and the means by which the Union can pursue these objectives would be adapted to address the new challenges

facing the Union.

6. The Union would be endowed with legal personality enabling it to negotiate and enter into international agreements with other countries or international organizations where this is required to achieve foreign policy objectives.

CHAPTER 10: THE COMMON FOREIGN AND SECURITY POLICY: OBJECTIVES, MEANS AND STRUCTURES[5]

I. The issue

Strengthening the Common Foreign and Security Policy (CFSP) is one of the key elements in equipping the Union with a coherent and effective external policy.

The texts suggested by the Presidency which follow would strengthen the CFSP in a number of significant and practical ways. In particular:

* the role of the European Council in defining the principles of and general and strategic guidelines for all areas of the CFSP would be highlighted;
* the Presidency, which has overall responsibility for policy implementation and representation of the Union under the CFSP, would be assisted by the Secretary-General of the Council, who would be given new standing and visibility in foreign policy;
* a new policy planning and early warning capability would be established under the responsibility of the Secretary-General of the Council;
* the Commission would be associated in an enhanced way with CFSP policy implementation and representation. This is important in order to ensure coherence in the overall external action of the Union;
* diplomatic meetings with third countries would be conducted by the Presidency, supported by the Council Secretary-General, the Commission and, if need be, by the incoming Presidency;

decision-making procedures would be improved in two ways:

* first, where unanimity would still apply, it would be possible to make a declaration of constructive abstention. A Member State which made such a declaration would not be obliged to apply the decision;
* second, qualified majority voting would be introduced for all decisions under the CFSP other than the adoption of Joint Actions and all

[5] **See also the proposal in Section IV, Chapter 18, for financing of the CFSP out of the Community budget in certain circumstances. This is discussed *infra*.**

decisions with a military/defence dimension subject, however, to provision that no vote would be taken where a member of the Council declared its intention to oppose the adoption of a decision for stated reasons of national policy. In such cases a qualified majority could ask to have the issue referred to Heads of State or Government for decision by unanimity.

II. Texts

Overall consistency of external activities

Amend the second subparagraph of Article C of the TEU

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate appropriately to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.

Definition of the principles of and general and strategic guidelines for the CFSP by the European Council

Amend the first subparagraph of Article J.1(1) of the TEU

The Union and its Member States shall define and implement a common foreign and security policy, governed by the provisions of this Title and covering all areas of foreign and security policy. The European Council shall define the principles of and general and strategic guidelines for the common foreign and security policy.

Objectives of the CFSP

Amend the first indent of Article J.1(2) of the TEU

2. The objectives of the common foreign and security policy shall be:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;

Comment

It has been proposed that Article J.1(2) be amended to include a reference to safeguarding the territorial integrity of the Union and the inviolability of its external borders. While this proposal remains under consideration, the Presidency suggests that the formulation above for the first indent of Article J.1(2) could take account of various concerns expressed.

Reinforced political solidarity clause

Amend Article J.1(4) of the TEU

4. The Member States shall support the Union,s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The Council shall ensure that these principles are complied with.

Comment

Other suggestions which have been made include:

1 couching a political solidarity clause in stronger terms that those suggested above;

2 introducing, in addition to the formulation suggested above, a reference to the development of mutual political solidarity between the Member States in the general provisions of the TEU.

The Presidency, the Troika and special representatives

Amend Article J.5 of the TEU

1. The Presidency shall represent the Union in matters coming within the common foreign and security policy.

2. The Presidency shall be responsible for the implementation of common measures; in that capacity it shall in principle express the position of the Union in international organizations and international conferences.

3. The Presidency shall be assisted by the Secretary-General of the Council.

4. In order to ensure consistency in the external activities of the Union, the Commission shall be fully associated in the tasks referred to in

paragraphs 1 and 2. The Presidency shall be assisted in these tasks if need be by the [words deleted] next Member State to hold the Presidency.

5. The Council may, whenever it deems it necessary, appoint a special representative with a mandate in relation to particular policy issues.

Comment

Other possibilities in relation to support for the Presidency are also under consideration, including the maintenance of the present troika arrangement.

The Secretary-General of the Council

New Article J.8b in the TEU

The Secretary-General of the Council shall assist the Council in matters coming within the scope of the common foreign and security policy.

To this end, the Secretary-General of the Council shall contribute to the formulation, preparation and implementation of policy decisions. The Secretary-General of the Council, acting on behalf of the Council at the request of the Presidency, may undertake or be involved in tasks relating to external representation of the Union, including conducting political dialogue with third parties.

Comments

1. Other approaches have been advanced in relation to the appointment of a new figure with a view to enhancing the effectiveness, continuity and visibility of the CFSP:

(i) Some have suggested the appointment of a personality for a set term outside the existing structures (a CFSP High Representative) to act under a specific mandate from the European Council.

(ii) Others have suggested the appointment of a person of Secretary General rank within the Council, accountable to the Council through the Presidency, to work in conjunction with the Secretary-General.

2. It has also been suggested that provision should be made for the appointment of the Secretary-General of the Council, as proposed in the new Article J.8b, to be endorsed by the European Council.

A new policy planning and early warning capability

Declaration to the Final Act

The Conference agrees that:

1. A policy planning and early warning capability shall be established in the General Secretariat of the Council under the responsibility of its Secretary-General.

2. The tasks of the policy planning and early warning capability should include the following:

(a) monitoring and analysing developments in areas relevant to the CFSP;

(b) providing assessments of the Union's foreign and security policy interests and identifying areas where the CFSP could focus in future;

(c) providing timely assessments and early warning of events or situations which may have significant repercussions for the Union's foreign and security policy, including potential political crises;

(d) producing, on request of either the Council or the Presidency or on its own initiative, argued policy options papers, to be presented under the responsibility of the Presidency as a contribution to policy formulation in the Council.

3. Appropriate cooperation shall be established with the Commission in order to ensure full coherence with the Union's external economic and development policies.

4. The policy planning and early warning capability shall consist of personnel drawn from the General Secretariat, the Member States, the Commission and the WEU.

5. Any Member State or the Commission may make suggestions to the planning capability for work to be undertaken.

6. Member States and the Commission will assist the policy planning process by providing, as appropriate, relevant information on a confidential basis.

The Political Committee

Amend Article J.8(5) of the TEU

Without prejudice to Article 151 of the Treaty establishing the European Community, a Political Committee [words deleted] shall monitor the international situation in the areas covered by common foreign and security policy and contribute to the definition of policies by delivering opinions

to the Council at the request of the Council or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the responsibility of the Presidency and the Commission.

Declaration to the Final Act

The Conference agrees that the Political Committee referred to in Article J.8(5) shall as a general rule meet weekly at Political Director or deputy level.

Instruments for implementing the CFSP

19. The following amendments, additions and renumbering are proposed to Articles J.1(3) to J.3 of the present Treaty

Article J.1(3) of the TEU

3. The Union shall pursue these objectives:

- by establishing systematic cooperation between Member States in the conduct of policy, in accordance with Article J.2;

- by adopting common positions in accordance with Article J.2a;

- by adopting joint actions in accordance with Article J.3.

Systematic cooperation

Article J.2 of the TEU

Member States shall inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that their combined influence can be exerted as effectively as possible by means of concerted and convergent action.

Common positions

New Article J.2a in the TEU

Whenever it deems it necessary, the Council shall adopt a common position.

Common positions shall define the approach of the European Union to a particular matter of a geographical or thematic nature. Member States shall

ensure that their national policies conform to the common position.

Joint actions

Article J.3

1. The Council shall decide, on the basis of general guidelines from the European Council, that a matter should be the subject of joint action.

2. Joint actions shall define the Union's objectives and the means to be put at the disposal of the Union to address specific situations where operational action is deemed to be required in areas in which the Member States have important interests in common. The following procedure shall apply for the adoption of joint actions.

3. Whenever the Council decides on the principle of joint action, it shall lay down the specific scope, the Union,s general and specific objectives in carrying out such action, if necessary its duration, and the means, procedures and conditions for its implementation.

[Paragraph J.3(2) deleted. For decision-making see new Article J.8a below]

4. If there is a change in circumstances having a substantial effect on a question subject to joint action, the Council shall review the principles and objectives of that action and take the necessary decisions. As long as the Council has not acted, the joint action shall stand.

(Remainder of Article J.3 unchanged)

Comment

The question of whether common positions and joint actions should be stated to be binding on the institutions of the Union is still to be considered further by the Conference.

Decision-making

New article J.8a in the TEU

1. Decisions to adopt joint actions in accordance with article J.3 and decisions referred to in Article J.4(3) shall be taken by the Council acting unanimously. Abstentions by members present in person or represented shall not prevent the adoption of such decisions.

When abstaining in a vote under subparagraph 1, a member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual

solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent more than 25 votes weighted in accordance with article 148(2) of the TEC, the decision shall not be adopted.

2. Decisions under this Title other than those referred to in paragraph 1 shall be adopted by the Council acting by a qualified majority. The votes of the members of the Council shall be weighted in accordance with Article 148(2) of the Treaty establishing the European Community. For their adoption, decisions shall require at least 62 votes in favour, cast by at least 10 members.

If a member of the Council declares formally that, for stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. If, however, the Council acting by a qualified majority in accordance with the previous subparagraph so requests, the matter shall be referred to the Council, meeting in the composition of the Heads of State or Government, for decision by unanimity.

3. For procedural questions, the Council shall act by a majority of its members.

Comments

1. There is a wide range of views on the extent to which the provision for unanimity under the common foreign and security policy could be relaxed with a view to improved decision-making.

2. Some delegations consider that the unanimity requirement does not constitute a significant constraint on decision-making and oppose any extension of qualified majority voting.

3. Other delegations could accept that even joint actions be adopted by qualified majority within general guidelines laid down by the European Council. To the extent that qualified majority voting were to apply, accompanied by a right of veto, it has been suggested that a qualified majority could nevertheless decide to proceed to a vote on the matter in question.

4. It has been suggested that the question of introducing super-qualified majority voting should be further examined.

SECTION III, Chapter 11. EXTERNAL ECONOMIC RELATIONS

I. The issue

Economic relations with third countries are an essential component of the Union's external action. The Community must be able to act decisively in a highly competitive international trading environment

which has changed radically in recent years, notably with the growing importance of new areas such as services, intellectual property and direct foreign investment. It is essential for all Member States that the Community be able to conduct effective multilateral negotiations in this evolving environment, notably in the global system of the World Trade Organization (WTO).

The issues involved are important and complex. They will clearly require further consideration by the Conference. There is a wide measure of support for amending the Treaty to ensure procedures that enable the Community to act effectively.

The text suggested by the Presidency for a new Article 113a would provide for a limited extension of external Community competence in order to ensure that the Community can defend effectively the interests of its Member States and its economic operators in the fields of services, intellectual property and direct foreign investment, notably in the WTO. The important features of the suggested approach are as follows:

- there would be no transfer of internal competence from the Member States to the Community. The Community's powers would be limited to the negotiation and conclusion of agreements in the framework of multilateral international organizations in the areas concerned (and would certainly not apply in organizations such as the World Bank and IMF);
- the Commission would be the sole negotiator, subject to appropriate control by the Member States;
- the Commission would negotiate only when authorized by the Council and within the framework of a mandate adopted by the Council;
- the resulting agreements would be concluded by the Council, with no need for national ratification procedures. They would not have direct effect.

If the approach suggested by the Presidency to address the problem which has been identified were to be accepted, a key question would be the decision-making procedure in the Council to be provided for in paragraph 4. In the Presidency's view, a provision for decisions to be taken by qualified majority would clearly enable the Community to defend the interests of its Member States more effectively.

There is still a wide range of views on this issue and on the nature of any Treaty changes which might be made in this area. Some delegations, while favouring strengthening the Treaty with a view to enhancing the ability of the Union to act in external economic relations, have focused in discussions on the need to introduce in the Treaty an obligation for the Community and for the Member States to take a single position in multilateral international organizations in the areas where powers are shared, as well as procedures to that effect. Other delegations oppose any Treaty change arguing that the Community has managed to negotiate successfully in the WTO in the areas of services, intellectual property and direct foreign investment and that any improvements should be made by way of a code of conduct.

The Presidency also recalls that the Conference has considered draft Treaty provisions on provisional application or suspension of international agreements, as well as on a possible new legal basis for the conclusion of "horizontal" agreements. Further detailed work remains to be carried out by the Conference on these issues.

II. Texts

Negotiations in multilateral international organizations on services, intellectual property and direct foreign investment

New Article 113a in the TEC

1. In the framework of multilateral international organizations, negotiations in the areas of services, intellectual property and direct foreign investment not covered by Article 113(1) shall be conducted by the Commission in consultation with the special committee provided for in Article 113.

2. To this end, the Commission shall make recommendations to the Council which shall authorize the Commission to open and conduct the negotiations within the framework of such directives as the Council may issue to it.

3. Agreements resulting from those negotiations shall be concluded by the Council, acting on a proposal by the Commission and after consulting the European Parliament. They shall not have direct effect.

4. In exercising the powers conferred upon it by this article, the Council shall act [by a qualified majority].

5. The provisions of Article 228(4),(5), (6) and (7) shall apply.

6. Member States and the Community shall retain their respective internal powers in the fields covered by this Article, subject to the provisions of Article 228(7).

Declaration to the Final Act

A declaration should be included in the Final Act of the Conference to provide that the Commission would conduct negotiations with **maximum transparency** vis-à-vis Member States. **[emphasis added]**

Chapter 12. SECURITY AND DEFENCE

I. The issue

As part of a credible foreign policy, the European Union must be able to respond effectively to the new and complex security challenges of the post Cold War world, which require multifaceted approaches and solutions. The achievement of its foreign and security policy objectives increasingly requires the Union to draw on the full range of instruments at its disposal.

The relationship already set out in the Treaty on European Union between the EU and the WEU is an important point of departure, particularly as regards the EU's potential to enhance its role in crisis management and peace support in furtherance of the objectives of the United Nations. The European Union itself does not possess military means. It has access to the capability of the WEU, of which not all EU Member States are full members. Discussions on the future security and defence development of the Union have to take account not only of the different defence situations and commitments of the Member States, but also of the fact that there is a broader European security context to these

discussions. Account must be taken of recent and continuing developments in NATO, notably the Berlin Ministerial meeting of June 1996 and its follow-up, in particular as regards the possible provision of NATO assets to the WEU for Petersberg tasks.

The approach suggested in this area takes account of the current institutional landscape in European security, which is evolving in a gradual manner. There is convergence towards the view that the Union should have at this stage an enhanced capacity to pursue objectives of the Union which may involve the use of military means, on the basis that the implementation of such tasks would be a matter for the WEU in a development of the already existing Treaty relationship between the EU and the WEU.

There appears to be a clear political will to make practical progress in this area, in particular by including in the Treaty the objectives of the Petersberg tasks.

The texts suggested by the Presidency which follows would notably:

reformulate the objectives of the CFSP in the field of security and defence to take account of developments in this area since the Treaty on European Union was negotiated;

provide for developing the relationship between the EU and the WEU including by fostering closer institutional relations;

incorporate the objectives of the Petersberg tasks in the Treaty so as to allow the Union to develop its action more effectively;

confirm that decisions and actions of the Union having military or defence implications would continue to be taken by unanimity.

II. Texts

Union's objectives in security and defence

Amend Article J.4(1) of the TEU

1. The common foreign and security policy shall include all questions relating to the security of the Union, including the **progressive** [present wording: eventual] framing of a common defence policy **in the perspective of** [present wording: which might in time lead to] a common defence.

Questions referred to in this article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.

Declaration to the Final Act

The Conference notes that the reference to humanitarian tasks in Article J.4(1) second subparagraph relates to the use of military means for humanitarian purposes and is without prejudice to the humanitarian tasks conducted by the Community under the Treaty establishing the European Community.

Comments

1. The formulation suggested for the first sentence of Article J.4(1) reflects a middle course

between two views which have been expressed. On the one hand, some wish to proceed now to the unqualified definition of a common defence policy and a common defence. On the other hand, others wish to see no change in the existing wording of Article J.4(1).

2. The tasks listed in Article J.4(1), second subparagraph, are as set out in paragraph II.4 of the WEU Petersberg declaration of 19 June 1992. The definition of the term "peacemaking" is not, however, uniform in all relevant organizations. An alternative formulation ("tasks of crisis management involving the use of military means") has been suggested to replace the words "tasks of combat forces in crisis management, including peacemaking". The WEU may wish to be involved should redefinition or clarification of these tasks remain at issue, and this may have to be reflected in an appropriate manner in the Final Act of the Conference.

3. The view has been expressed that a statement of the European Council's competence to set guidelines, including for the WEU, should be inserted also in Article J.4(1). See above the amendment proposed to Article J.1(1).

4. The view has been expressed that, in inserting the objectives of the Petersberg tasks in Article J.4(1), reference should also be made to the principles of the United Nations Charter.

Relationship with the WEU

Amend Article J.4(2) of the TEU

1. The Western European Union (WEU) is an integral part of the development of the Union and the Union shall accordingly foster closer institutional relations with it.

The Union will avail itself of [word deleted] the WEU [words deleted] to elaborate and implement decisions and actions of the Union which have defence implications.

2. When the Union has recourse to the WEU to elaborate and implement decisions of the Union on the tasks referred to in Article J.4(1), all Member States of the Union shall be entitled to participate fully in the tasks in question. The Council, in agreement with the institutions of the WEU, shall adopt the necessary practical arrangements. These arrangements shall allow all Member States contributing to the tasks in question to participate fully and equally in planning and decision-taking in the WEU insofar as these relate to the commitment and deployment of that Member State's national contribution.

Decisions having defence implications dealt with under this paragraph shall be taken without prejudice to the policies and obligations referred to in Article J.4(4).

Comments

1. The Presidency, on its responsibility, has suggested a wording for paragraph 1 above which seeks a balance between two views regarding the development of a common defence policy and the EU's relationship to the WEU. One view is that the current wording of the Union's objectives and the present Treaty language on the WEU ("the EU requests the WEU"), and indeed on security and defence more generally, should be retained. The other view is that the Union's authority over the WEU should be spelled out ("the EU instructs the WEU") along with

a timetable for eventual integration of the WEU into the EU. It is clear that these views remain on the table and that this issue, which is one of the most sensitive under consideration at the Conference, will need to be considered further.

2. Some have argued that an optional Protocol should be annexed to the Treaty setting out the mutual defence commitment which at present applies to full WEU members.

3. The issue of the rights of Member States who are not full members of the WEU in relation to WEU decision-making on Petersberg tasks undertaken at the instigation of the European Union may have to be addressed through a parallel or related process involving the WEU, the results of which would be reflected in a Declaration to be adopted as part of the Final Act of the Conference. In any event, consideration will have to be given to appropriate adjustments to Declaration No. 30, made by the Member States of the WEU, which formed part of the Final Act of Maastricht.

Unanimity to apply for Union decisions with military or defence implications

Amend Article J.4(3) of the TEU

3. **The Council shall act unanimously** when dealing with issues under this article having **military or** defence implications.

Chapter 13. LEGAL PERSONALITY OF THE UNION

The European Union is increasingly perceived by public opinion, by the media and by its third country partners as a political entity. There is an increasing need for European representatives, when negotiating with third countries or international organizations, to deal with the whole range of issues covered by the TEU, which include matters covered by the Common Foreign and Security Policy and by cooperation in the fields of Justice and Home Affairs. However, the Treaty does not provide for the Union as such, as distinct from the Community, to conclude international agreements and, until now, it has been necessary to resort to pragmatic expedients whenever the conclusion of even an administrative agreement is called for. It is widely acknowledged that this situation is far from satisfactory from a legal or political point of view and has hampered the Union's ability to act effectively on the international scene.

I. The issue

The text suggested by the Presidency which follows would:

- endow the Union with legal personality;
- set out a procedure for the Presidency to negotiate agreements on behalf of the Union subject to unanimous authorization and negotiating directives issued by the Council. The resulting agreements would be concluded by the Council by unanimity.

The Presidency considers that the text it has suggested offers a good basis for the ongoing

work of the Conference on this question, while being aware that other approaches, which would go some way towards achieving the objective referred to, have also received support. Much of what needs to be achieved in this area could be done simply by providing the Union with the capacity to conclude international agreements. This would require adapting the Presidency's suggested text, in particular by removing the first two paragraphs.

If the Conference were to follow the Presidency's suggestion to endow the Union with legal personality, it would be logical to consider merging the existing legal personalities of the three Communities and of the Union into a single legal entity. This could be done in a way which would not affect in any way the respective features of the Community, CFSP and JHA and which would allow the pillar structure established by the Treaty on European Union to remain unchanged.

II. Text

Endowing the Union with legal personality

New Article in the TEU

1. The European Union shall have legal personality.

2. In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission.

3. In international relations, the Union shall enjoy legal capacity to the extent necessary for the exercise of its functions and the fulfilment of its purposes. To this end, the Union shall be represented by the Presidency of the Council.

4. Where the Council intends to conclude an agreement on behalf of the Union, it shall, acting unanimously, authorize the Presidency, assisted by the Commission if appropriate, to open the necessary negotiations. The negotiations shall be conducted within the framework of directives issued by the Council, acting unanimously.

5. Agreements shall be concluded on behalf of the Union by the Council, acting unanimously on a recommendation from the Presidency and after consulting the European Parliament. The European Parliament shall deliver its Opinion within a time-limit which the Council may lay down according to the urgency of the matter. In the absence of an Opinion within that time-limit, the Council may act.

6. The Union shall not be empowered to conclude any agreements providing for the use of military means.

7. No provision of this Article shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts amending or supplementing them.

8. The Council, a Member State or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty.

9. Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Union and the Member States.

Comment

The view has been expressed by some delegations that the lack of an explicit legal personality of the Union has not constrained the ability of the Union to act. These delegations oppose any Treaty change in this area.

ECTION IV: THE UNION'S INSTITUTIONS[6]

Introduction

1. The Florence European Council identified "... the good functioning of institutions while respecting their balance and the efficiency of the decision-making process..." as one of three main areas to be addressed in the general outline for a draft revision of the Treaties.

2. There is general agreement at the Conference on the central importance of this issue. The institutions must function efficiently and effectively now and in the future; the balance between institutions must be respected; and they must operate as democratically and as openly as possible so that their representative nature is clearly seen and their legitimacy in the eyes of the public is maintained and reinforced.

3. Already, in the present Union of fifteen Member States, there is need to consider steps to ensure that the institutions will function to best effect. Beyond this, it is necessary to prepare now for the larger and more diverse Union of the future so as to avoid paralysis and to preserve the capacity of the institutions to act.

4. The negotiations to date have shown that on some institutional issues there is already a good deal of common ground.

5. The central role of the European Parliament must be recognised and find full expression in the institutional procedures of the Union. The role of the European Parliament as "co-legislator" with the Council was firmly established in the Maastricht Treaty. In the light of experience, that procedure should now be extended to new areas; and it should be simplified and made more efficient and understandable.

6. The Court of Justice, too, must be in a position to function effectively and play its vital role in a Community founded on Treaties and on the rule of law.

7. This Section of the present document sets out draft proposals in Treaty form on a number of these issues. There are on the other hand some other very important issues where it is generally accepted that it would be preferable not to put forward specific Treaty texts at this stage, pending further negotiation at the Conference. The Presidency shares this view. These include in particular issues relating to the Commission, its size and composition, and the voting system in the Council (in particular the extension to new areas of the rule of qualified majority voting (QMV) instead of unanimity, the question of re-weighting of votes in the Council and the threshold for a qualified majority). These, it is generally agreed, are issues which will have to be settled at a later stage of the Conference.

---

[6] Note that there are a great number of proposed changes in Section IV which is comprised of Chapters 14-19. Only the Introduction to the Section and the Chapter on the Commission, Chapter 16, are reproduced here.

8. Although it has not offered specific textual proposals on these questions the Presidency has considered it desirable to try to clarify the issues at stake and to identify the options in a way which may help the incoming Presidency to find a solution in the final stages of the Conference. A short analysis of each of the issues is therefore offered under the appropriate heading in this Section.

9. This Section also contains a chapter dealing with a number of other institutional and budgetary issues which are explained in the introduction of that chapter.

10. The role of national parliaments in relation to the European Union is dealt with in the last Chapter of this Section where certain improvements are proposed.

11. One view in relation to several of the issues dealt with in this Section is that the status quo should be maintained. This applies, for example, to extending the scope of qualified majority voting and of the codecision procedure, and to the method of appointing the President of the Commission.

CHAPTER 16. THE COMMISSION

The issue

1. The Commission has a central role to play in the institutional structure of the Union: as initiator; as administrator; as mediator; as negotiator; and as guardian of the Treaties. It is vital therefore to the good functioning of the Union that it be both efficient and effective.

2. The Florence European Council asked the Conference to address the manner of appointing the Commission and its composition. The main point at issue has been the future size of the Commission and whether it should continue to include at least one national from each Member State as the Union enlarges further. If the present rule that the Commission must include at least one national from each Member State and the present practice that a second national is drawn from each of the larger States are maintained as the Union enlarges, then the membership of the Commission could in due course increase to 30 or more.

3. The need to preserve the efficiency of the Commission and its public acceptability throughout the Union is already common ground.

4. Some argue on the one hand that both of those aims would best be served by a smaller Commission which would be seen to be less explicitly linked with nationality than at present and thus more dedicated to the common interest. On the other hand, it is argued equally strongly that those aims would best be served by continuing to include at least one national from each Member State in the Commission not, of course, as a national representative but because the Commission needs to be constantly alert to the sensitivities in each Member State when making its proposals or deciding

issues.

Possible avenues of approach

5. A number of possible approaches have been put forward at the Conference. The Presidency considers these approaches worth recording as a possible help to further discussion. These approaches fall broadly under two headings: (A) a Commission with a membership smaller than the number of Member States and (B) a Commission with a number of members at least equal to the number of Member States. Some of the variants set out below are not mutually exclusive and could have a relevance under both headings.

A. Commission with a membership smaller than the number of Member States

6. One broad approach would be to reduce the membership of the Commission below its present level and to fix the number of Members of the Commission, for the future, even in an enlarged Union, at a level considerably below the number of Member States. Numbers suggested have ranged from 10 to 20.

7. If this approach were followed one possibility would be to introduce a rule of rotation which would ensure that each Member State in turn, on an equal basis, has an opportunity for a set period to nominate a Commissioner. (A variant of this could be to provide for some method of grouping two or more Member States into "constituencies" and allowing for rotation within each).

B. Commission with a number of members at least equal to the number of Member States

8. The second broad approach would be to maintain the number of Members of the Commission at least equal to the number of Member States. At present, the larger Member States, of course, each nominate two Commissioners.

9. One suggestion is that the five large Member States should nominate one Member of the Commission only. In a Union of the present size, this would mean a Commission of 15 Members. If the rule of one Commissioner, and one only, from each Member State were established and accepted, it would be possible to admit five new Member States before the Commission would grow again to its present membership of 20.

10. It would also be possible to focus on the internal structure and organization of the Commission. There could be some grouping or differentiation or hierarchy within the Commission. With this approach it would be possible for each member State to continue to nominate one Member of the Commission and each Member would have a vote in the College of Commissioners.

11. Various sub-options have also been advanced for consideration, some of

which could be of relevance also if the Commission had a membership smaller than the number of Member States. They include ideas such as the following:

(a) establish a system of senior and junior Commissioners: the latter would not be responsible for a full portfolio;

(b) establish a certain number of Vice-Presidents, each of whom would have additional responsibilities;

(c) the establishment of two Vice-Presidents who would function as real deputies to the President of the Commission. One could be responsible for internal affairs, the other for external relations. Each of the two Vice-Presidents would lead a team of three or four other Commissioners each dealing with a particular area, much as certain larger Member States have a Foreign Secretary or Foreign Minister who is helped by a number of Ministers of State (in the sense of "junior" Ministers).

12. There is a wide measure of agreement on strengthening the powers of the President of the Commission to make the Commission more effective. Some would be willing to contemplate giving the President authority, under some arrangement to be determined, both to select, and perhaps to dismiss, individual Commissioners in certain circumstances as well as an explicit right to allocate and re-shuffle portfolios.

Timing

13. It is argued that the size of the Commission already exceeds the optimum size and that it should be reduced before enlargement. Others see the issue of the size of the Commission as one which arises only in the context of future and perhaps gradual enlargement of the Union. As regards timing, it is suggested that this could allow a phased approach or possibly allow deferral of the issue until the need to address it arises - either of which might open up new possibilities.

Summary

14. At this stage of the Conference, the Presidency would not wish to endorse one of these approaches over the others. It would, however, suggest that a combination of ideas based in part on internal organization and structuring of the Commission and in part on strengthening the powers of the President of the Commission could offer a useful avenue of approach to further discussion and perhaps eventually to a settlement of this question, in conjunction with some other sensitive issues, in the later stages of the Conference. The issue of timing may also play a role.

Section V: ENHANCED COOPERATION - "FLEXIBILITY"

1. The issue of what has come to be called "flexibility", "enhanced cooperation" or "differentiated integration" - that is the possibility for a number of Member States less than the full membership to cooperate more closely in specific areas using the institutional framework of the Union - is one of the most important issues being examined by the Conference. Whatever may be agreed in this regard - or alternatively the absence of agreement - will be of the greatest significance for the future development of the Union.

2. The issue has been discussed by the Conference on several occasions and important proposals have been tabled. Discussions have been constructive and a degree of common ground seems to be emerging. However, the issues are complex and sensitive and the Presidency accepts the widespread view of delegations that it would be premature at the present stage of the negotiations to put forward draft Treaty texts.

3. The extent to which new flexibility mechanisms prove necessary will depend at least to some degree on the progress made in various substantive areas under consideration by the Conference.

4. The concept of flexible arrangements in the Union is not new. The existing Treaty provisions, for example, allow Member States to move at different speeds towards the objective of full Economic and Monetary Union.

5. However, the larger the number of Member States and the greater their diversity, the more the issue of flexibility comes to the fore. In the view of many Member States, further enlargement of the Union will make the development of flexibility provisions inevitable.

6. Several Member States have emphasized the importance of any enhanced cooperation developing inside rather than outside the Union. They stress that the institutions, procedures and mechanisms of the Union should apply.

7. Since discussion is at a relatively early stage, the Presidency's assessment which follows binds delegations neither as regards principles nor details. Some delegations still favour the status quo.

8. Amongst the issues on which, in the Presidency's view, a degree of common ground seems to be emerging are the following:

(a) flexibility which already exists in different forms may, subject to appropriate conditions, provide an appropriate approach especially with the prospect of further enlargement;

(b) flexibility should not be regarded as an alternative to the normal decision-making process or to traditional Community mechanisms such as transitional periods;

(c) flexibility should be used only subject to precisely defined conditions which should ensure notably that the internal and external coherence of the Union's action is maintained, that the acquis is preserved in full and that the Union's objectives are respected;

(d) flexibility in a given area should be open equally to all Member States but no Member

These include :

(i) whether the decision to establish enhanced cooperation in a particular area should be taken by all Member States, by a qualified majority or by a specific number of Member States. On the one hand, some argue that unanimity is an essential requirement to trigger flexibility in all or in some areas. Others consider that once certain basic conditions have been objectively fulfilled and the present and future interests of non- participating states are safeguarded, those Member States which wish to proceed should not be prevented from doing so;

(ii) what role the Commission should have in deciding on enhanced cooperation in a particular area and whether that role should be adapted according to the pillar concerned;

(iii) what the minimum number of participating Member States should be to enable enhanced cooperation to go ahead in a particular area;

(iv) whether the Treaty should specifically exclude the possibility of having recourse to enhanced cooperation in certain areas, for instance the internal market and its related policies or where distortions of competition might result for non-participating Member States;

(v) what the financing arrangements would be;

(vi) what provisions would apply to enable non participating Member States to join at a later stage.

State should be obliged to participate;

(e) the possible requirement for flexibility varies according to the subject matter concerned and the issue of flexibility should therefore be approached on a pillar by pillar basis;

(f) the position of non-participating Member States should be respected.

9 . Three broad forms of possible flexibility have been examined by the Conference. These forms of flexibility would not be mutually exclusive and could be complementary.

(i) Flexibility could apply when individual acts or decisions are adopted in certain policy areas. The present outline draft Treaty already suggests provisions in two specific areas which would allow for case by case flexibility: (a) the possibility of constructive abstention is suggested in the context of the Common Foreign and Security Policy (see Section III, Chapter 10); (b) in relation to Justice and Home Affairs, the possibility is made explicit of conventions entering into force for a limited number of Member States (see Section I, Chapter 3);

(ii) Provision could be made for flexible cooperation in a specific area by detailing all aspects in the Treaty itself, in the form of a Protocol. This approach would involve all of the relevant details to cover that particular area as part of the Treaty revision negotiations. This possibility has been mentioned in connection, for example, with the possible incorporation of the Schengen Agreement into the Treaty;

(iii) The Treaty could take a more general approach which would set out (a) general provisions defining conditions to be respected for enhanced cooperation in whatever areas this might take place in future and (b) specific clauses in appropriate parts of the Treaty setting out conditions and rules to be respected for the application of flexibility in the relevant areas. This would imply that the detailed provisions for implementing such cooperation in any particular area would be developed whenever required to the extent that this proved necessary.

10. As regards the third form of flexibility referred to above, the following overall structure has been discussed:

(i) **a general clause** in the common provisions of the TEU establishing the general principle of enhanced cooperation which would not, in itself, be operational but which would govern whatever arrangements for enhanced cooperation were later put in place;

(ii) the **general conditions** to be respected for any enhanced cooperation would be set out in a general Article. Examples of such possible general conditions are referred to in paragraph 8 above;

(iii) **detailed enabling provisions** in particular parts of the Treaty which would set out the specific conditions for enhanced cooperation in the relevant areas.

11. If the Conference were to decide to develop further the idea of enhanced cooperation based on this structure, several questions would remain to be resolved.